

Article 7 and us

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Maximilian Steinbeis Sa 16 Dez 2017

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It was Poland's new Prime Minister Mateusz Morawiecki himself, who delivered the news of what will hit him next week: if it is true what he says and the press reports, the EU Commission will launch a European constitutional emergency procedure against his country next Wednesday. For the first time in the history of the Union, it will propose according to Art. 7 of the EU Treaty to the Council to "determine that there is a clear risk of a serious breach by a Member State" of the fundamental constitutional values of the Union. The reason: the imminent subjugation of the independent judiciary to the will of the Polish ruling party PiS.

Proposing to determine a risk... that may sound a bit lame to those who expect a fist on the table after all we have endured from Poland over the last two years. Well, soft power is what makes Europe strong, isn't it? We may have a constitutional emergency, but (for reasons) we do not have an emergency constitution. All we have is the theoretical possibility to take Poland's right to vote in the Council away from them at the end of the procedure, but as long as Hungary stands firmly by Poland's side to block the Council's unanimous decision with its veto, this will never get practical. (On launching a further and clearly justifiable Article 7 procedure against Hungary itself and thereby take away their voice, too, see here and here).

In terms of domestic policy, it is easy to see why Morawiecki apparently believes that he can afford to accept the article 7 procedure as a decided matter with no more than a shrug. Municipal elections will be held in Poland in the autumn of 2018. The opposition party PO is still in control of many city halls, including those of the country's six largest cities. It would certainly quite convenient for the PiS to rally voters in some sort of a national resistance struggle against those ungodly cosmopolitans in Brussels for months to come. (Speaking of elections: this week the Polish parliament, largely unnoticed here, decided to amend the electoral law in a way that politicizes electoral oversight and threatens to plunge the municipal elections next year into chaos.)

Nevertheless, the explosive power of this step should not be underestimated. On the one hand, the statement alone of an imminent danger to the constitutional values of the Union would strengthen all those who want to tighten the screws on Poland in terms of financial transfer payments. On the other hand, the addressee of the expected letter of the Commission will not be Poland alone. It will be the Council and the other 27 member state governments represented in it. They will now have to decide whether or not to follow the Commission's proposal. They will have to do something that most of them went out of their way to avoid during the past few years: to take a stand towards the galloping process of deconstitutionalisation in Poland and other parts of the Union in recent years. They must show their true colours now: Are they or are they not, in a case as blatant as this, prepared to indict one of their own for a "clear risk of a serious breach" to the Union's common constitutional values?

22 votes are required for this statement to be made by the Council. How will the new strong man of the Czech Republic Andrej Babiš decide? How will Sebastian Kurz's center-to-far-right coalition in Austria? Will the British use the occasion for a farewell present to the EU constitution? Which side will Romania's sensationally corrupt government take, which is currently pursuing its very own plans to put the judiciary under their thumb?

Every single European government will have to commit itself in one way or another. Including Angela Merkel, in whatever constellation she reigns. Every European government will have to explain to its voters how it decides and why. That is why this step is so tremendously, game-changingly significant, in my view. Throughout Europe there will be a debate on the "clear risk" that constitutional backsliding in individual Member States puts all of us in. And it will be a truly European debate.

Which we can lose, of course. It may very well turn out that half a dozen or more member states do take Poland's side, that there is no four-fifth majority in the Council in the end. In which case the Union would have to face the fact that it is no longer in a position to defend itself in any constitutionally meaningful and legitimate way. But at least that is something we can fight for now. At least the issue is now a matter of politics. That alone is a huge gain.

Something about... fish?

Another major topic of this week's EU summit was the future military cooperation in Europe, which goes under the acronym PESCO in the EU insider lingo, a name that might be associated rather with the Common Fisheries Policy than the tremendously important issue it stands for. That issue has certainly a lot of pros and cons and we, as Union citizens, would certainly be thrilled to form an opinion about it if only we had been given the opportunity to do so. [JELENA VON ACHENBACH](#) finds her mind boggled in the most frightful manner by the fact that, after all the crises and calamities the Union has gone through in recent years, a project of such immense political relevance is still being carried out in the same technocratic mode as ever (in German).

The European Court of Justice, for its part, has shown more responsiveness in its ongoing *Taricco* pingpong game with the Italian Constitutional Court and its insistence to keep Italy's constitutional identity unharmed by the EU's attempts to harmonize criminal law statutes. [CHRISTINA PERISTERIDOU](#) and [JANNEMIEKE OUWERKERK](#) add the perspective of criminal law to the discussion.

In Austria, we take great pleasure in constitutional justice as well: the Constitutional Court in Vienna finds the coexistence of marriage for non-same-sex and partnership for same-sex couples discriminatory – the first time in Europe that a court has pushed open the door to marriage for all. [ELISABETH GREIF](#) reports under a headline our readers versed in latin and history will appreciate: *Tu, felix austria, nube!* (in German).

Elsewhere

On the occasion of the autumn conference of the Migration Law Network, the JUWISS blog features a series of interesting articles on asylum and migration law and migration policy topics.

EVA BREMS draws our attention to a new chamber judgment from Strasbourg on the evergreen question of Islamic headgear in the courtroom – except that in the Bosnian case it was, for a change, a male who was ordered to take off his skullcap. The remarkable thing about the decision: he won. “Upon reading the press release, my first – admittedly cynical – reaction was: ‘so Muslims have rights after all’. And indeed, the Court has to date rejected ALL article 9 accommodation claims of Muslims in states where Islam is a minority religion.”

DIEGO ACOSTA analyses a ruling by the European Court of Justice on the question of when EU member states are allowed to expel third country citizens with a criminal record who have a long-term residence permit – a question that will likely gain in importance after Brexit.

KENNETH ARMSTRONG throws a bucket of water on the enthusiasm about the Tory rebellion in the UK parliament who helped winning back to Parliament the last word about the Brexit negotiations, and so does MARK ELLIOTT.

GÉRALDINE GIRAUDEAU explains what can be expected from the referendum in the South Pacific archipelago of New Caledonia, which currently is a part of France and will vote on its independence in 2018.

MIGUEL ÁNGEL PRESNO LINERA is puzzled by a trial before the Spanish *Audiencia Nacional* Court on the occasion of a fine of 14,400 euros for a Catalan citizen who organized the collective booing of King Felipe VI. and the national anthem during a football match in Barcelona.

LEONID SIROTA predicts that the pending constitutional complaint against the regulation of party financing in Québec has good chances of success.

SERGIO VERDUGO describes the complicity of the Bolivian Constitutional Court with President Evo Morales in the destruction of the Bolivian constitutional state.

TIM FISH HODGSON reports how the South African Constitutional Court tries to balance respect for traditional tribal law, which allows polygamous marriages, with women’s rights.

So much for, well... for this year. I will go on vacation now for a few weeks and will report back on these pages in early January. I wish you happy and relaxing holidays, and see you in 2018!

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